

ARKANSAS SUPREME COURT

No. CR 06-959

Opinion Delivered January 11, 2007

MICHAEL CAVE
Petitioner

v.

STATE OF ARKANSAS
Respondent

PRO SE MOTIONS FOR BELATED
APPEAL OF JUDGMENT OF
CONVICTION, TO CORRECT
RECORD, AND FOR APPOINTMENT
OF COUNSEL [CIRCUIT COURT OF
GREENE COUNTY, CR 2004-315]

MOTIONS FOR BELATED APPEAL
AND TO CORRECT RECORD
DENIED; MOTION FOR
APPOINTMENT OF COUNSEL MOOT.

PER CURIAM

On November 29, 2005, judgment was entered reflecting that petitioner Michael Cave had entered a plea of guilty to a charge of battery in the first degree and misdemeanor driving while intoxicated for which the court imposed a sentence of sixty months' imprisonment, a fine of \$1,000, and 180 hours of community service. The court further suspended imposition of an additional sixty months' imprisonment. On August 29, 2006, petitioner filed the instant *pro se* motion in this court seeking leave to proceed with a belated appeal of the judgment. We remanded the motion for Findings of Fact on certain issues. *Cave v. State*, CR 06-959 (Ark. Sept. 28, 2006) (*per curiam*).

Pursuant to Ark. R. App. P.--Crim. 1, there is ordinarily no right to appeal from a judgment entered on a plea of guilty. The exceptions are: a conditional plea of guilty premised on an appeal of the denial of a suppression motion pursuant to Ark. R. Crim. P. 24.3(b); when there is a challenge

to testimony or evidence presented before a jury in a sentencing hearing separate from the plea itself; when the appeal is an appeal from a posttrial motion challenging the validity and legality of the sentence itself. *See Seibs v. State*, 357 Ark. 331, 166 S.W.3d 16 (2004); *see also Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003).

The partial record lodged by petitioner with respect to his motion consisted of the judgment of conviction and the circuit court docket sheet. The face of the judgment did not reflect that the plea fell within any of the recognized exceptions. The docket sheet, however, bore the notation, “[petitioner] appears with attorney...unconditional plea of guilty...*plea is a conditional plea pursuant to Rule 24.3 ARCAP w/ consent of prosecutor and defense.*” [Emphasis added.]

Generally speaking, a defendant waives his right to appeal when he pleads guilty. *Berry v. City of Fayetteville*, 354 Ark. 470, 125 S.W.3d 171 (2003); *Barnett v. State*, 336 Ark. 165, 984 S.W.2d 444 (1999). In the matter before us, it appeared that Rule 24.3(b) provided the only possible procedure for an appeal from petitioner’s plea of guilty. Rule 24.3(b) provides:

With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or *nolo contendere*, reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress seized evidence or a custodial statement. If the defendant prevails on appeal, the defendant shall be allowed to withdraw the conditional plea.

By the terms of Ark. R. Crim. P. 24.3(b), conditional pleas, and the accompanying right to appeal, are limited to an adverse determination on a pretrial motion to suppress. *Berry, supra*. This court has interpreted Rule 24.3(b) as requiring strict compliance with the language that the right to appeal be reserved in writing; otherwise, the appellate court does not obtain jurisdiction. *Barnett, supra*.

It was not clear from the partial record that the requirements of Rule 24.3(b) had been met

in petitioner's case and there was no writing reflecting that petitioner had entered his guilty plea conditionally except for the contradictory entry on the docket sheet. It could not be determined from the partial record that there was anything to appeal, as the record did not reflect that the trial court ever made an adverse ruling on a suppression motion or even that such a motion was ever filed. For these reasons, we remanded the matter to the circuit court on the following issues: (1) whether there was a motion to suppress on which the trial court made an adverse ruling; (2) whether petitioner's guilty plea was entered conditionally pursuant to Rule 24.3(b); (3) whether, if the plea was a conditional plea, petitioner informed his counsel that he desired to appeal within the time allowed to file a notice of appeal. The court held a hearing on the issues, and the Findings of Fact and the record of the evidentiary hearing on the issues are now before us.

After the Findings of Fact were filed here, petitioner filed a motion asking that the record be corrected, which was in essence a response to the findings. Nothing contained in the response bears on the ultimate question of whether the plea of guilty was subject to appeal. Petitioner also filed a motion for appointment of counsel to represent him if the belated appeal is granted.

After examining the record and taking testimony from petitioner and the attorney who represented him when the judgment was entered, the trial court found that there was no motion to suppress filed in the case and that the reference to a "conditional" plea on the docket sheet referred to a motion to dismiss the charges on an "Eighth Amendment argument" that the court denied some two months before the plea was entered. The testimony at the evidentiary hearing indicated that petitioner had considered taking an appeal from the denial of the motion despite his decision to plead guilty and despite his having been informed by the court and his attorney that it was doubtful whether the rules of procedure allowed for such an appeal. The court accepted the plea, noting on

the docket that it was unconditional but also noting that it was conditional in that the court had informed petitioner that it would permit him to appeal from the denial of the motion to dismiss if he desired to do so. The court found after hearing testimony from petitioner and his attorney that after counsel informed petitioner that the appeal would likely be unsuccessful, petitioner abandoned the idea of proceeding with an appeal.

As there was no adverse ruling on a motion to suppress evidence and the denial of the motion to dismiss, which did not seek to suppress evidence, did not fall within the purview of Rule 24.3(b), it is clear that petitioner's plea was not subject to appeal within any of the exceptions to the provisions of our procedural rules that allow an appeal from a guilty plea. Accordingly, petitioner's motion for belated appeal from the judgment of conviction and motion to correct the record are denied. The motion for appointment of counsel to represent petitioner on appeal is moot.

Motions for belated appeal and to correct record denied; motion for appointment of counsel moot.